No. 84-1176

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, OCCIDENTAL CHEMICAL CORPORATION, and THE BROOKLYN UNION GAS COMPANY,
Appellees.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OF APPELLEE OCCIDENTAL CHEMICAL CORPORATION

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LISTING OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Pursuant to Rule 28.1 of the Supreme Court Rules, the following list sets forth all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of Occidental Chemical Corporation:

Canadian Occidental Petroleum Ltd.—Canada (Dominion)
Direccion Oxy, S.A. de C.V.—Mexico
International Ore & Fertilizer Belgium, S.A.—Belgium
International Ore & Fertilizer S.p.A.—Italy
Occidental Chemical Holding Corporation—California
Occidental Minerals (Philippines), Inc.—Philippines
Occidental Petroleum Corporation—California
Occidental Petroleum Investment Co.—California
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Oxy Chemical Corporation—California
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Vinimarket-Comercio e Industria de Plasticos Limitada ("Vinimarket")—Brazil
Vinor Vinilicos do Nordeste Ltda. ("Vinor")—Brazil
Vulcan Material Plastico S.A. ("Vulcan")—Brazil

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MOTION TO DISMISS OF APPELLEE OCCIDENTAL CHEMICAL CORPORATION

Appellee Occidental Chemical Corporation ("Occidental") respectfully moves, pursuant to Rule 16.1, to dismiss the appeal filed by Consolidated Edison Company of New York, Inc. ("Con Ed" or "appellant") from the final judgment of the Court of Appeals of New York dated October 25, 1984 (Appendix to Jurisdictional Statement ("App.") 27a-28a) on the ground that the appeal does not present a substantial federal question.

I. INTRODUCTION

This appeal involves the question whether Section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3 (1982), 92 Stat. 3144

(App. 169a-175a), preempts the minimum rate provisions of Section 66-c of the New York Public Service Law (App. 205a-206a), a complementary statute which, like PURPA, was designed to promote the public interest in encouraging the development of cogeneration and small power production facilities.[1] In pertinent part, Section 66-c requires electric utilities doing business in New York to purchase electricity from alternate energy production facilities at a rate of not less than six cents per kilowatt-hour. Appellant challenged this minimum rate provision below, and challenges it here, on the basis that the state rate exceeds the rate authorized by PURPA.

Occidental, which operates one of the largest cogeneration facilities in New York State using municipal waste as a primary energy source, intervened in the Court of Appeals. A unanimous Court of Appeals found no basis for Con Ed's preemption claim, and upheld the constitutionality of the statute insofar as it is challenged by this appeal.[2] (App. 1a-15a)

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[1] Cogeneration involves the sequential production of electrical power and useful thermal energy. Because two products (*i.e.*, steam and electricity) are produced from the same fuel, cogeneration yields substantial energy savings as compared to the independent production of steam and electricity. "Small power production facilities" generally use abundant, indigenous and renewable resources to produce energy. The energy obtained from these types of facilities can be used to displace expensive and insecure fossil fuel supplies, *e.g.*, oil and natural gas, which utilities would otherwise use, as well as provide environmental and other benefits. Cogeneration and small power production facilities will be hereinafter referred to jointly as alternate energy production facilities.

[2] Before the Court of Appeals, Con Ed also contended that Section 66-c was in conflict with a second statute, the Federal Power Act (FPA), 16 U.S.C. §§ 791a *et seq.*, because Section 66-c required New York electric utilities to purchase electricity from alternate energy production facilities that were not exempt pursuant to PURPA from rate regulation under the FPA. Although it concluded that "[g]enerally, those facilities that qualify under PURPA in this State also qualify under the state law" (App. 4a), the Court of Appeals, indicating its sensitivity to the Supremacy Clause, struck down Section 66-c insofar as it required purchases from facilities that were not exempt from the FPA. (App. 12a-15a)

This appeal, therefore, involves only the authority of the state to establish a minimum rate for purchases of electricity from entities which are *not* subject to federal rate regulation under the FPA.

Section 210 of PURPA, Section 66-c of the New York Public Service Law, their respective legislative histories, and the proceedings below are fully discussed in the Statement of the Case set forth in the Motion to Dismiss Appeal or Affirm Judgment Below filed by co-appellee Public Service Commission of the State of New York ("PSC"), and will not be repeated here.

II. REASONS THAT NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

1. "Pre-emption of state law by federal statute or regulation is not favored." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). An analysis of the validity of Supremacy Clause preemption claims, therefore, commences with "the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). "[F]ederal regulation of a field of commerce [will] not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter *permits no other conclusion*, or that the Congress has *unmistakably so ordained*." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (emphasis added).

2. The clearest manifestation that Congress has unmistakably ordained to preempt state law is through express statutory language. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977). Con Ed does not assert that there is any statutory provision in PURPA which explicitly prohibits states from requiring utilities to pay rates to cogeneration and small power production facili-

ties in excess of avoided cost. Had Congress desired to preclude states from encouraging such alternate energy production facilities by requiring payment of higher rates, it could have so stated expressly in the statute. *See New York State Dep't of Social Serv. v. Dublino*, 413 U.S. 405, 414 (1973) (hereafter *Dublino*).

3. As this Court has recognized, the principal purpose underlying Section 210 of PURPA is to encourage the development of alternate energy production facilities. *FERC v. Mississippi*, 456 U.S. 742, 750 (1982); *American Paper Inst. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 417 (1983) (hereafter *AEP*). There is no indication in the legislative history of PURPA that Congress had a "clear and manifest purpose," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *accord, Dublino*, 413 U.S. at 413, to preclude complementary state enactments designed further to encourage the development of alternate energy production facilities.

The limited portions of the legislative history to which Con Ed points in a footnote (Jurisdictional Statement ("JS") 16 n.*) to convert PURPA into a pervasive price control statute are tangentially relevant at best, inconclusive, misleading, and hardly a basis for sustaining Con Ed's position on preemption. "Reliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and 'a step to be taken cautiously.'" *New England Power Co. v. New Hampshire*, 455 U.S. 331, 342 (1982).

a. Con Ed first relies (JS 16 n.*) on three excerpts from the Conference Report. The first two excerpts are from a discussion of Section 210(b) and indicate only the obvious: that states *in implementing the FERC rules* must follow those rules. There is no hint in these statements that the conferees were even addressing state action pursuant to state law which provides more encouragement to on-site generation than PURPA, much less that Congress intended to bar such laws.

The fact that Congress was not addressing complementary state action is evident from a passage quoted by Con Ed and other portions of the Conference Report. In the passage quoted by Con Ed, the conferees stated that avoided cost was to act as an "upper limit" upon the *federal* incentive which *FERC* could provide to cogenerators in its rules "under this section." H.R. Rep. No. 1750, 95th Cong., 2d Sess. 98, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7659, 7832. Thus, as the Court of Appeals found (App. 8a), the "upper limit" applies only to rates that can be required "under this section" of PURPA. The limited scope of the conferees' discussion is further elucidated by a portion of the Conference Report which Con Ed does not quote: "[s]ubsection (b) of this section deals with the requirements that the Congress places *on the Federal Energy Regulatory Commission* in prescribing the rules under subsection (a)." *Id.* at 97, 1978 U.S. Code Cong. & Ad. News at 7831 (emphasis added).[3]

A reading of PURPA itself confirms this interpretation. Section 210(b), which established the full avoided cost ceiling, applies by its express terms only to the rules "prescribed under subsection (a)" of Section 210 of PURPA. Section 66-c is a statutory enactment which is neither a rule prescribed under Section 210(a) nor a rule implementing Section 210. Thus, the conferees were dealing with a subject entirely different from Section 66-c.

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[3] The "upper limit . . . under this section" language of the Conference Report is equally, if not more plausibly, interpreted as applying "solely within the scope and confines of [the federal program]." *Dublino*, 413 U.S. at 416-17. It is particularly appropriate to resolve this ambiguity against a finding of preemption where the federal and state statutes share the common purpose of encouraging cogeneration. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132-33 (1978) (Court is "generally reluctant" to infer preemption, and "it would be particularly inappropriate to do so" where Maryland statutes and Robinson Patman Act share common purpose favoring "equal treatment of all customers" over freedom of sellers "to make selective competitive decisions").

They were concerned with the FERC's interpretation of PURPA and the actions of states insofar as they implemented those rules. The Conference Report contains no discussion of further state initiatives, such as Section 66-c, which are not adopted pursuant to PURPA and which provide *greater* encouragement to on-site generation.

The distinction between implementing rules under PURPA and state legislative enactments such as Section 66-c is a critical one. While Congress intended that states comply with FERC rules pursuant to PURPA, there is no evidence, and no reason to infer, that Congress intended to bar additional action by states in furtherance of the goals of Section 210(a).

The third excerpt from the Conference Report, which Con Ed underscores (JS 17 n.*). is found in the section of the Report discussing Section 210(*c*) of PURPA, which deals with utilities' *sales* of electricity to qualifying facilities, *not* in the earlier section that discusses Section 210(b), which deals with utilities' *purchases* of electricity from cogenerators. Because alternate energy producers sometimes must buy electricity from a utility, such as when the cogeneration facility is shut down for repairs, Congress was concerned that the rate charged by utilities not be discriminatorily high. The two subsections thus cover separate elements of the relationship between qualifying facilities and utilities. Section 210(b) is an incentive rate which attempts to encourage cogeneration and small power production through avoided cost rates for power *sold* to the utility. Section 210(c) merely seeks to bar discrimination against qualifying facilities in the rates charged for power they *purchase* from the utility by requiring rates to be based on *traditional* ratemaking principles.

The full text of the Conference Report's discussion, placing the sentence Con Ed highlights in context, reads:

> Subsection (c) deals with the requirements with respect to *sales by utilities to* cogenerators and small power producers and requires that these rates be just and reasonable and in the public interest and do not discriminate against cogenerators or small power producers. Here the phrase "just and reasonable" is intended to refer to traditional utility ratemaking concepts. The conferees do not intend that the cogenerator or small power producer pay any more or any less than is otherwise just and reasonable in terms of the utility receiving the reasonable rate of return for providing service to those kinds of users. However, unreasonable rate structure impediments, such as unreasonable hook up charges or other discriminatory practices, would not be allowed.
>
> The conferees use the phrase "not discriminate against cogenerators or small power producers" because they were concerned that the electric utility's obligations to purchase and sell under this provision might be circumvented by the charging of unjust and non-cost based rates for power solely to discourage cogeneration or small power production. This phrase should not be construed to permit discrimination against the electric consumers of an electric utility in formulating rates under this provision. *The provisions of this section are not intended to require the rate payers of a utility to subsidize cogenerators or small power producers.* H.R. Rep. No. 1750, 95th Cong., 2d Sess. 98, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7659, 7832 (emphasis added.)

Thus, in context, this statement reflects the conferees' intent that *the rates for sales* of electricity to (and not the rate for *purchases from*) alternate energy production facilities be established in accordance with traditional utility ratemaking concepts that neither discriminate in favor of nor against such facilities. It is irrelevant to the issues here presented.

b. Con Ed's reliance (JS 17 n.*) on Senator Percy's prepared hearing testimony before a subcommittee of the Senate Energy Committee is similarly irrelevant and misleading. The statement relates to a proposed amendment (1) which was never adopted and (2) which principally addressed *sales* of power by electric utilities to qualifying facilities.[4] Discussions relating to an amendment which was discarded in the legislative process can hardly be characterized as probative "legislative history."

In short, the portions of the Conference Report and the remarks of Senator Percy evince no intention to foreclose state action in the cogeneration field pursuant to state enactments such as Section 66-c, provided that the state initiatives do not vitiate the paramount federal objective to remove barriers to cogeneration and small power production. In any event, Congress has certainly not "act[ed] so unequivocally as to make clear that it in-

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[4] Senator Percy's amendment—Amendment No. 746 to S. 1469, an early Senate version of PURPA—contained no reference whatever to avoided cost. 123 Cong. Rec. 25,849 (1977). The principal purpose of the amendment was to extend to all small power producers the protections which the bill made available to cogenerators. *Id.* at 25,848.

S. 1469 was never adopted; instead, the Senate Committee on Energy and Natural Resources reported another bill, S. 2114, to replace S. 1469. It was in S. 2114 that the incremental cost limit first appeared. Senator Percy made a statement on the Senate floor which clarifies the intent underlying his prior amendment to S. 1469, and confirms that it was not his objective to impose an avoided cost ceiling on the States. Senator Percy's floor statements demonstrate that the focal point of his concern was upon the potential for discriminatory rates for *sales* by electric utilities to on-site generators. Thus, characterizing as "important" the ability "to prescribe rules relating to rates *charged to* small producers" (emphasis added), Senator Percy promised that his amendment would "restore language similar to that in my original amendment *concerning the rates charged small producers.*" 123 Cong. Rec. 30,693 (1977) (emphasis added). Although Senator Percy ultimately introduced his "perfecting amendment" to S. 2114, 123 Cong. Rec. 30,772 (1977), it was never adopted.

tends no regulation except its own," *Rice v. Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 236, nor has it "unmistakably . . . ordained" that measures like Section 66-c should be a dead letter. *Florida Lime & Avocado Growers, Inc. v. Paul*, *supra*, 373 U.S. at 142.

4. The construction of a statute by an administrative agency charged with its implementation is ordinarily entitled to substantial judicial deference. *See, e.g., Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *Train v. Natural Resources Defense Council*, 421 U.S. 60, 87 (1975). Indeed, this Court has noted the considerable deference to be accorded to FERC's construction of PURPA as the expert agency to which Congress entrusted the implementation of PURPA's " 'untried and new' " provisions. *AEP*, *supra*, 461 U.S. at 422. In upholding FERC's rule requiring electric utilities to make interconnections with qualifying facilities, 18 C.F.R. § 292.303(c) (1984), this Court emphasized that it need not find that the administrative construction was "the only reasonable one." Rather, "[w]e need only conclude that it is *a* reasonable interpretation of the relevant provisions." *Id.* at 422-423 (emphasis in original); *accord, Train v. Natural Resources Defense Council*, *supra*, 421 U.S. at 75.[5]

FERC's regulations state that "[n]othing *in this subpart requires* any electric utility to pay more than the avoided costs for purchases." 18 C.F.R. § 292.304(a)(2) (1984) (emphasis added). Nowhere in the regulations is there any bar to state legislative enactments providing higher rates.[6] In fact, the Preamble to FERC's regula-

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[5] Con Ed was one of the parties challenging the FERC's regulations in the *AEP* case.

[6] Stripped to its essence, Con Ed's position is that Section 66-c conflicts with FERC's regulations which Section 210(f) requires states to implement. However, when read in light of the Preamble to those regulations, it is clear that FERC's regulations do not bar

tions implementing Section 210 of PURPA declares that "[s]tates are free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement" of cogeneration and small power production than that provided by PURPA. 45 Fed. Reg. 12214, 12221 (1980). The Preamble constitutes a contemporaneous explanation of the scope and meaning of these regulations which is inseparable from the regulations themselves. The Preamble makes clear that the regulations permit states to provide additional rate incentives.

In a footnote (JS 18 n.*), Con Ed attempts to brush aside this interpretation, arguing first, that it is inconsistent with the statute and congressional purpose, and, second, that FERC did not grasp the issues involved. The former contention begs the question since it *presumes* that the statute and congressional purpose are contrary, a showing Con Ed has not made. The latter is frivolous, for it is apparent from the Preamble itself that FERC was aware of the existence of state statutes providing for purchase rates above avoided cost and of the potential preemption question.

It is a "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 381 (1969). This deference is particularly appropriate when the agency interpretation is a contemporaneous construction of the statute, and the administrative interpretation is not counter to the statutory language and is consistent with the express statutory purpose of "encourag[ing] cogeneration and small power

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and, in fact, expressly permit states to adopt, minimum rate provisions. Thus, there is no colorable claim of conflict and there is a substantial question as to whether Con Ed has properly invoked the Court's appellate jurisdiction under 28 U.S.C. § 1257(2).

production," 16 U.S.C. § 824a-3(a) (1982). FERC's construction of PURPA is thus a reasonable interpretation upon which the Court of Appeals (App. 9a-10a) properly relied. *E.g.*, *AEP*, 461 U.S. at 422; *Udall v. Tallman*, 380 U.S. 1, 16 (1965).[7]

5. Con Ed's conception of the avoided cost limitation as imposing a maximum price upon the States is irrational in light of FERC's avoided cost rule itself, as reflected in its regulations implementing PURPA. Con Ed fails to explain how Section 210(b) of PURPA can legitimately be viewed as a maximum price statute in the face of Section 292.301(b) of FERC's cogeneration regulations (App. 189a), which permits *negotiated agreements providing for purchase rates which can be in excess of avoided cost.* Specifically, Section 292.301(b)(1) (App. 189a) provides that nothing in FERC's avoided cost rule "[l]imits the authority of any electric utility or

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[7] Con Ed notes (JS 13) that the Kansas Supreme Court has held that Section 210(b) of PURPA prohibits a state purchase rate in excess of avoided cost unless the state public utilities commission obtains a "waiver" from FERC pursuant to 18 C.F.R. § 292.403 (1984). *Kansas City Power & Light Co. v. State Corp. Comm'n*, 234 Kan. 1052, 676 P.2d 764 (Kan. 1984). However, this decision misreads the *AEP* case, which the Kansas court found controlling, and FERC's PURPA regulations. *AEP* did not address the authority of states to provide rate incentives to qualifying facilities in excess of avoided cost; even Con Ed implicitly concedes this. (JS at 11, 19) Moreover, reliance on FERC's "waiver" regulations was erroneous, since such regulations clearly contemplate that a waiver be obtained *only* in the case of purchases from a qualifying facility at *less than avoided cost.* Thus, 18 C.F.R. § 292.403(b) provides that FERC may grant a waiver only upon a showing by the state regulatory authority "that compliance with any of the requirements of Subpart C [governing purchase and sale arrangements between qualifying facilities and utilities] is not necessary to encourage cogeneration and small power production and is not otherwise required under section 210 of PURPA." On its face, this standard is inapplicable to a state-prescribed purchase rate which *exceeds* avoided cost and thus provides *more* encouragement of cogeneration than FERC's rule mandates.

any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart." In its explanatory Preamble, FERC also stated unequivocally that such negotiated arrangements "do not violate the Commission's rules under section 210 of PURPA." FERC Order No. 69, 45 Fed. Reg. 12214, 12217 (1980).[8] While nothing in the avoided cost rule "requires any electric utility to pay more than the avoided costs for purchases," 18 C.F.R. § 292.304(a)(2) (App. 193a), it is equally clear that the rule does not foreclose action outside the constraints of the federal rule—such as by virtue of voluntary agreement—which would operate to require a payment in excess of avoided cost.

If utilities and cogenerators can agree to purchase rates in excess of avoided costs under PURPA, and these costs can be passed through to ratepayers with the consent of the state, *it makes no sense* to assert that Congress has barred states from adopting higher rates under state programs designed to complement PURPA. Con Ed's construction of Section 210(b) ignores this reality, leads to an illogical and unacceptable result, and cannot stand.

6. Con Ed's interpretation is also misplaced because it would transform the limited federal incentive program envisioned by Congress into a pervasive federal price control statute. Congress enacted Section 210 of PURPA to encourage the development of alternate energy sources, and thereby to lessen demand for scarce fossil fuels. *FERC v. Mississippi*, *supra*, 456 U.S. at 750, 756; *AEP*, *supra*, 461 U.S. at 417. In enacting Section 210, Congress sought to circumvent "traditional" utility resistance to purchasing power from, and selling power to, alternate

[8] This regulation, which is patently inconsistent with Con Ed's view of Section 210 as an unyielding "price control" statute, was not challenged by Con Ed or other electric utility interests in *AEP*, *supra*, and is presumptively valid.

energy producers, *FERC v. Mississippi*, *supra*, 456 U.S. at 750,[9] and to remove alternate energy producers from the financial and administrative burdens imposed by federal and state utility regulation.

At the same time, Congress envisioned a circumscribed federal involvement in the regulation of the relationship between cogenerators and electric utilities and a concomitant broad role for the States.[10] (*See* App. 8a) This Court, in commenting upon the underlying purposes of

[9] This resistance was rooted in utility industry apprehension about the competitive threat "this new source of competition" posed to its monopoly position, 123 Cong. Rec. 25, 848 (1977), and was widely noted. *See* FERC Order No. 69, 45 Fed. Reg. 12214, 12215 (1980). Such *hostility* to cogeneration is reflected by the fact that *this appeal marks the third time utilities have come before this Court to frustrate accelerated development of cogeneration and small power production facilities.* In *FERC v. Mississippi*, *supra*, 456 U.S. at 744 n.*, several utility groups appeared as *amici curiae* to support the State of Mississippi's constitutional challenge to PURPA on Tenth Amendment and Commerce Clause grounds. In *AEP*, *supra*, 461 U.S. at 403-04, Con Ed and other electric utilities unsuccessfully contended that FERC's full avoided cost rule exceeded the scope of FERC's authority under PURPA. This appeal "involves the next stage" (JS 11) of the electric utility industry's assault upon cogeneration and small power production, draped in the guise of protecting an alleged (but in fact concocted) federal interest in exclusively controlling the extent to which development of alternate energy sources is to occur.

[10] The limited role intended by Congress is further highlighted by Section 210(e) of PURPA. Pursuant to Section 210(e), FERC has exempted alternate energy producers from rate regulation under the FPA, which applies to wholesale sales of electricity in interstate commerce. 18 C.F.R. § 292.601(c) (App. 203a). By virtue of Section 210(e), the transactions at issue in this appeal are not subject to federal rate regulation under the FPA. In the face of Congress' broad exemption of alternate energy producers from the federal statute governing wholesale rates, it is hardly surprising that Con Ed has been unable to find a "clear and manifest" congressional purpose to bar state action which provides additional encouragement for the development of alternate energy production facilities.

the entirety of PURPA, including Section 210, concluded that Congress eschewed an all-embracing federal approach in favor of "limited federal regulation . . . of relationships between cogenerators and electric utilities." *FERC v . Mississippi, supra,* 456 U.S. at 758. In short, Congress intended that the federal government, through FERC and its cogeneration rules, should inject itself into the sphere of utility regulation normally reserved for the States only to the extent necessary to rectify the imbalance in the relationship between cogenerators and electrical utilities, and not to foreclose additional incentives to cogenerators in excess of the federal standards.

III. CONCLUSION

This appeal should be dismissed for want of a substantial federal question.

Respectfully submitted,

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